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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INC., APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

FILED JANUARY 6, 1941.

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[fol. 1]

IN SUPREME COURT OF APPEALS OF VIRGINIA, AT RICHMOND

CASKEY BAKING COMPANY, INCORPORATED, Appellant,

v.

COMMONWEALTH OF VIRGINIA, Appellee

Petition for Writ of Error From the Corporation Court of the City of Winchester

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

I. KIND OF SUIT

This is a criminal action for violation of section 192b of the Tax Code, originating by the Police Justice of the City of Winchester, upon whose warrant petitioner was found guilty. This warrant was issued on September 9th, 1938, upon the complaint of C. P. McVicar, Commissioner of Revenue of the City of Winchester, and charged petitioner with selling or offering for sale, goods, wares and merchandise to a licensed retail merchant without having obtained the license required by the aforesaid section of the Tax Code. Upon appeal, petitioner was found guilty by the Corporation Court of the City of Winchester, on the — day of ——, 1940, and fined —— dollars and costs. The sentence was suspended for a period of sixty days so that petition for a writ of error might be made here.

A transcript of the record, including the opinion of the [fol. 2] Judge of the Corporation Court, who tried the case without a jury, as determined and settled by that Court, is hereby exhibited, from which it appears that the Supreme Court of Appeals has jurisdiction.

Your petitioner is advised and represents to the Court that the judgment and order of the Corporation Court of the City of Winchester is erroneous, and that your petitioner is aggrieved thereby in the following particulars:

II. ASSIGNMENTS OF ERROR

1. Section 192b of the Tax Code of Virginia, as amended by the Acts of 1938, chapter 305, as applied to your petitioner, is unconstitutional and void, in that

(a) It discriminates against your petitioner.

(b) It denies to your petitioner equal protection of the laws of Virginia.

(c) It places an improper burden on interstate commerce.

2. By enacting the statute, having reference to section 73 of the Tax Code, the General Assembly usurped the powers of Congress under Art. 1, section 8, clause 3 of the Constitution, which provides that Congress shall have the power to regulate commerce between the States.

III. Statement of Facts

There is a stipulation of facts in the record. No evidence was taken before the Police Judge. In the Corporation Court, instead of taking evidence, there was a stipulation as to the facts, without waiving the right of either party to object on the ground of immateriality.

The condensed facts are as follows:

The Caskey Baking Company, Incorporated, a West Virginia corporation, domiciled in the City of Martinsburg, in that State, and domesticated in Virginia, was and is engaged in making and selling bread to retail dealers in the territory tributary to Martinsburg. This company has paid its annual registration fees and the State income tax upon its net profits allocable to its Virginia business.

After the manufacture of the bread by petitioner, it was brought to the State of Virginia by motor vehicles and sold [fol. 3] from place to place from these trucks to licensed retail merchants. These trucks operated over regular routes at regular intervals. The trucks belong to petitioner and were operated by employees, who were paid a fixed salary and who had no interest in the merchandise nor in the proceeds from such sales. Manifestly, as it was agreed, the bread sold was not injurious to the health nor damaging to the morals of the citizens of Virginia.

The petitioner here had no place of business in Virginia; had no property permanently located in Virginia; was not a manufacturer taxable on capital in Virginia; was not a distributor of manufactured products in Virginia on its purchases; and was not a licensed wholesale dealer.

The petitioner, at the time of the service of the warrant, towit, September 9th, 1938, had not secured the license prescribed by section 192-b of the Tax Code, and on that day

sold and delivered bread from its truck in Winchester to Mr. J. E. Keffer, a licensed retail merchant, the bread so sold and delivered being manufactured by petitioner in Martinsburg, West Virginia, and brought to Winchester, Virginia, in the truck from which it was taken to be sold and delivered.

IV. Questions Involved Here

The Corporation Court of the City of Winchester upon the warrant, issued upon the complaint of C. P. McVicar, found the defendant below, petitioner here, guilty and fined petitioner, as set out in the record. Judge Williams filed a written opinion which he made part of the record.

The questions involved here are:

1. Is section 192-b of the Tax Code of Virginia, as amended by Acts of 1938, chapter 305, as applied to your petitioner, unconstitutional and void, because—

(a) It discriminates against your petitioner?

(b) It denies to your petitioner equal protection of the laws of Virginia?

(c) It places an improper burden on interstate commerce?

2. Did the General Assembly, by enacting section 192-b of the Tax Code, having reference to section 73 of the Tax Code, usurp the powers of Congress under article 1, section 8, clause 3 of the Constitution, which provides that Congress shall have the power to regulate commerce between the States?

[fol. 4] Points and Authorities

The Tax Imposed Is a Revenue Measure

A license tax imposed for the unconditional right of peddling is a revenue tax.

Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839.

Discrimination, Unequal Protection of the Laws

14th Amendment, Federal Constitution. Sec. 201 Tax Code of Virginia.

Classification of objects for taxation is permissible but the classification must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treasted alike.

Norfolk v. Griffin Bros., 120 Va. 534, 91 S. E. 640;
Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299;
State Bd. Tax Comrs. v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. Ed. 1248;
Smith v. Farr (Colo.), 104 Pac. 401.

Regard must be had to the particular subject of action.

Smith v. Cahoon, 203 U. S. 553, 51 Sup. Ct. 582, 75 L. Ed. 1264.

Mere difference is not enough, discriminations cannot stand if they offend the plain standards of a common sense.

Hartford Steam Boiler Inspection & Ins. Co., v. Harrison, 301 U. S. 459, 75 Sup. Ct. 838, 81 L. Ed. 1223.

If the condition precedent of the statute cannot be satisfied by a non-resident manufacturer without the imposition of a burden which the resident escapes, there is a real discrimination and an offense against the Fourteenth Amendment, if both corporations are within the State. Moreover it is a burden on interstate commerce.

Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 41 Sup. Ct. 571, 67 L. Ed. 1029.

After being domesticated in Virginia, the appellant is put on a level with domestic corporations of the same kind, stands equal with them, and any tax laws made to apply after it has been so received into the State are to be regarded as laws enacted for the purpose of raising revenue for the State and must conform to the equal protection clause of the Fourteenth Amendment.

[fol. 5] Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 47 Sup. Ct. 179, 71 L. Ed. 372.

If there be an injurious discrimination against goods because of their source, the act is unconstitutional.

Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915;
Bethlehem Motors Corp. v. Flynt, supra.

Interstate Commerce

Art. 1, Sec. 8, Cl. 3, Federal Constitution

A license tax on the right to sell the goods is a tax on the goods.

Brennan v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719.

Likewise a tax on the business itself.

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384, 55 Sup. Ct. 477, 79 L. Ed. 934.

A tax on the right to carry on business at all is a direct burden on interstate commerce.

Pullman's Palace Car Co. v. Commonwealth of Penna., 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613.

The appellant's method of doing business in interstate commerce.

Wagner v. Covington, 251 U. S. 95, 95 Sup. Ct. 104, 64 L. Ed. 157;
Sault Ste. Marie v. International Transit Co., 234 U. S. 353, 34 Sup. Ct. 826, 58 L. Ed. 1337;
Commonwealth v. Myer, supra;
Bethlehem Motors Corp. v. Flynt, supra.

License tax statutes are construed liberally in favor of the citizen against the government.

Watts v. Comm., 106 Va. 851, 56 S. E. 223;
Brown v. Comm., 98 Va. 336, 36 S. E. 485.

What Is Capital and Where Taxable?

Sec. 73, Tax Code of Virginia

For the purpose of taxation, intangible property acquires a situs at the domicile of the creditor.

Virginia v. Imperial Sales Co., 293 U. S. 15, 55 S. Ct. 12, 79 L. Ed. 171;
[fol. 6] Smith v. Ajax Pine Line Co., 87 F. (2d) 567, cert. den. 300 U. S. 677, 57 S. Ct. 670, 81 L. Ed. 882;
Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 S. Ct. 773, 80 L. Ed. 1143;
First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061;
Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 1339.

The Exemption Granted Other Peddlers as a Comparison

Sec. 192 of the Tax Code exempts peddlers of milk, butter, eggs and family supplies of a perishable nature, if grown or produced by them. If not grown or produced by them a license tax of $50.00 is demanded. It also exempts seafood peddlers entirely unless they buy from the person catching or taking the same, when a license tax of $25.00 is demanded. Seafood peddlers are exempt from sec. 192 b.

There is no distinction between the carriage of one foodstuff and carriage of another.

Smith v. Cahoon, supra.

Bread is an article of food sold for immediate consumption.

Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459.

ARGUMENT

The fee demanded of the defendant by the Commonwealth under section 192-b of the Tax Code, is nothing more or less than a license tax imposed for the unconditional right of peddling. It is not a tax on property, personal or real, nor a sales tax. It is purely a revenue measure.

Phoebus v. Manhattan Social Club, 105 Va. 144, 55 S. E. 839.

I

Legislation may be adjusted to differences in things and situations, but it is limited to the extent that the 14th Amendment of the Federal Constitution demands that it make no unreasonable or arbitrary classification or discrimination, which amendment requires the same methods to be applied to all the constituents of the class subjected to the taxation and equal and uniform operation upon all persons in similar circumstances.

Under this head it will be noted that Section 192-b exempts [fol. 7] from its provisions, a distributor or vendor of motor vehicle fuels and petroleum products, tobacco, seafood, and a manufacturer taxable on capital by Virginia, or a distributor of manufactured goods paying a State License on his purchases.

And under Section 201 of the Tax Code it will be noted that a person can retail, and therefore peddle, tobacco by paying an annual State license tax of Five Dollars ($5.00).

Section 192-b provides for a license tax of no less than One Hundred Dollars ($100.00) for each vehicle used in the peddler's business.

It, therefore, appears from those considerations that the appellant occupies a position under 192-b, which is by no means on an equality with the persons exempted thereby. The exempted parties have an absolute right to peddle their products without paying the tax under 192-b. True, some of those exempted are paying taxes in another capacity, but those taxes are not for the privilege of peddling. They are for the rights and benefits which accrue to them as residents of Virginia. For that matter the applicant is likewise paying such taxes in West Virginia and has been domesticated in Virginia to carry on its business of selling bakery products.

The only difference between the appellant and a manufacturer resident in Virginia is this: the appellant manufactures in another state, and sells in Virginia in exactly the same manner as the resident bakers. Both the resident manufacturer and the appellant pay income taxes on their Virginia business. The resident pays a tax on his capital, the defendant does not, and the latter has paid a tax for the privilege to do business as a corporation in Virginia.

Regardless of the tax structure of Virginia and the economic forces moving to lay taxes in order to equalize the burden, a tax on capital cannot be used as an excuse to exempt a person in the same class (peddlers) with others, from paying for the privilege to do that which for others in the same class a tax is imposed. The summation of that situation is that both have a privilege for the exercise of which one must pay, the other not. The privilege has always been present, and the statute recognizes it.

A more practical application of the unlawful exemptions in the statute is disclosed, however, by a consideration of the exempted persons. A peddler of sea food can peddle a foodstuff without paying the tax. Is there any real distinction between a peddler of sea food, and a peddler of bakery products? Each is selling nothing more than a foodstuff. Should not the sea food peddler share his burden of taxation if that be the purpose of the statute? Obviously [fol. 8] there is no more reason to tax a peddler of one food and exempt a peddler of another.

Likewise a peddler of tobacco. He can carry on his vocation after the payment of Five Dollars ($5.00) license

tax. There could not be any relation between peddlers of tobacco, sea food and bakery products, so different so far as revenues are concerned, that the discrimination could run the range of license taxes from zero to One Hundred Dollars ($100.00).

Admitted is it that for the purpose of taxation a State may classify objects of the tax. But the classification so made must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated or circumstanced shall be treated alike. Norfolk v. Griffin Bros., 120 Va. 534, 91 S. E. 640. Colgate v. Harvey, 296 U. S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299. State Bd. Tax Comrs. v. Jackson, 283 U. S. 527, 51 Sup. Ct. 540, 75 L. Ed. 1248. Regard must be had to the particular subject of action. Smith v. Cahoon, 203 U. S. 553, 51 Sup. Ct. 582, 75 L. Ed. 1264. Mere difference is not enough, discriminations cannot stand if they offend the plain standards of common sense. Hartford Steam Boiler Inspection and Ins. Co. v. Harrison, 301 U. S. 459, 75 Sup. Ct. 838, 81 L. Ed. 1223.

Realizing that the object of Section 192-b is to provide revenue, and recognizing the mandates of the above citations, no substantial difference between a peddler of one foodstuff and the peddler of another can be found. How could the vendor of one food be different from another? Each peddler is similarly situated; the plain standards of common sense are offended. Smith v. Cahoon, supra, is an apt illustration of how true this is.

II

Regardless of the above discrimination, section 192-b has a further effect, wherein it exempts a manufacturer taxable on capital by Virginia. To escape the tax the foreign manufacturer must set up a factory in Virginia or become a wholesaler or distributor of manufactured goods. The only argument against this charge of inequality in this regard is that it applies alike to non-resident as well as resident manufacturers, the inference being, as suggested by Armour v. Virginia, 118 Va. 242, 87 S. E. 610, 246 U. S. 1, 38 Sup. Ct. 267, 62 L. Ed. 547, that its condition can be as easily met by the non-resident as by the resident manufacturer, [fol. 9] and therefore it discriminates against neither. But there is no sound basis in this. An identical situation was

considered in Bethlehem Motors Corp. v. Flynt, 256 U. S. 421, 41 Sup. Ct. 571, 65 L. Ed. 1029. Said Justice McKenna:

"To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the State, it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another state, some of its products in the first instance being within the State, Therefore, there is a real discrimination, and an offense against the 14th Amendment, if we assume that the corporations are within the state."

Since the appellant is a corporation domesticated in Virginia, it meets the mandate of that case decided after Armour v. Virginia, supra, which is not applicable to the case at bar, and if it were, has been, to that extent, impliedly overruled.

Moreover, the appellant being a domesticated corporation in Virginia, has the further protection of Hanover Fire Ins. Co. v. Carr, 272 U. S. 494, 57 Sup. Ct. 179, 71 L. Ed. 372, which determined that after its admission, a foreign corporation is put on a level with domestic corporations of the same kind, stands equal with them, and any tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment.

Therefore, because the appellant, in order to escape the tax, must change its method of doing business, and become a wholesaler, or distributor, or resident manufacturer, taxable on capital, it has been discriminated against. Especially so when sea food peddlers, tobacco peddlers, and manufacturers taxable on capital by Virginia, need not change their method of selling, and the manufacturer taxable on capital by Virginia need not become a wholesaler or distributor. This answers the opinion of the lower court that the defendant could escape the ta_ by coming into Virginia and setting up its business to coincide with the exemptions.

[fol. 10]

III

If there be an injurious discrimination against goods because of their source, the act is unconstitutional.

In Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915, a statute identical with section 192-b was under considera-

tion. And the corporation in that case occupied the same extrastate position as the Caskey Baking Company, except that it had not been domesticated in Virginia. It sold its products as a peddler, through a non-resident agent, who was the defendant. For failure to pay a peddlers license tax the agent was found guilty. The statute exempted a manufacturer taxable on capital by Virginia. Said Judge Keith:

"A citizen of Virginia who had manufactured the identical article could have hawked or peddled it from place to place within the limits of the Commonwealth without incurring the penalties denounced by Section 32. If that be so, then the statute under consideration does injuriously discriminate against the products of other states and the rights of other citizens, and is an attempt to fetter commerce among the states, and does deprive the citizen of another state of the privileges and immunities possessed by citizens of this state, and is an infringement of the provisions of the constitution and therefore void."

How applicable to the case at bar. It cannot be imagined that any manufacturer in Virginia corporate or natural, even though manufacturing without the state, is not taxable on capital by Virginia. Sec. 73 of the Tax Code is too inclusive to argue otherwise. It is apparent then, under Commonwealth v. Myer, supra, and cases there cited, that not only the appellant's goods are being discriminated against because it has not seen fit to be forced into Virginia to manufacture, a result condemned by Bethlehem Motors Co. v. Flynt, supra, but that the appellant itself is being injured.

Taxable on Capital

When it is realized that the situs of the ownership of intangible capital, as defined by said sec. 73, is the domicile of the creditor or the owner, the discrimination against a non-resident or goods of non-resident origin, becomes [fol. 11] more apparent. Virginia v. Imperial Coal Sales Co., 293 U. S. 15, 55 Sup. Ct. 12, 79 L. Ed. 171, in interpreting sec. 73, held that money on hand and bills of account receivable have their situs, for purposes of taxation in Virginia. Moreover, as was held also by Smith v. Ajax Pipe Line Co., 87 Fed. (2d) 567, cert. den., 300 U. S. 677, 57

Sup. Ct. 670, 81 L. Ed. 882; Wheeling Steel Corp. v. Fox, 298 U. S. 193, 56 Sup. Ct. 773, 80 L. Ed. 1143; First Bank Stock Corporation v. Minnesota, 301 U. S. 234, 57 Sup. Ct. 677, 81 L. Ed. 1061; Curry v. McCanless, 307 U. S. 357, 83 L. Ed. 1939, all intangibles have their taxation situs at the domicile of the creditor or owner. The last named case even holding the same in reference to bank deposits.

Now, how could any resident manufacturer of Virginia escape taxation on capital by Virginia? It is impossible, regardless of the business the resident might do. Even if manufactured in another state, he would still be taxable on capital by Virginia. Obviously, then, the exemption of sec. 192-b, given to manufacturers, taxable on capital by Virginia, is a subterfuge used to veil the real intent of the statute. It could have no other purpose.

The same applies to goods of non-resident origin. If a manufacturer of Virginia taxable on capital peddles them he is exempt because under sec. 73, it is impossible for him not to be untaxed on capital. The exempting provision of the statute is an illegal piece of shrewd legislation. Knowing that no non-resident could, at first instance qualify, the legislature immediately discriminated against goods of foreign origin, protecting local manufacture and manufacturers. Said Mr. Justice Field, in Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347:

"It is sufficient to hold now that the commercial power (of the Federal Government over a commodity) continues until the commodity has ceased to be the subject of discriminating legislation, by reason of its foreign character. That power protects it, even after it has entered the State, from any burdens imposed by reason of its foreign origin. The Act of Missouri encroaches upon this power in this respect and is, therefore, in our judgment, unconstitutional and void."

From these considerations it must be apparent that the "taxable on capital" exemption is nothing more than a veiled discrimination, which when brought to light, discloses [fol. 12] the obvious intent of the statute to protect local manufacturers to the detriment of those in the same situation as the appellant. No discrimination could be more selective and detrimental in its application.

Interstate Commerce

The lower court relied strongly on Wagner v. Covington, 251 U. S. 95, 95 Sup. Ct. 104, 64 Ed. 157; Home Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754, and Emert v. Missouri, 156 U. S. 296, 39 L. Ed. 430, for sustaining the proposition that peddling is interstate commerce. These cases simply hold that because the tax was uniform on all peddlers, interstate commerce was not burdened. They recognize that the carrying of the goods over the state lines is interstate commerce. Said Mr. Justice Pitney in Wagner v. Covington: "Of course the transportation of plaintiff's goods across the state line is of itself interstate commerce." And quoting from Robbins v. Shelby Taxing District, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, he further said:

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way."

It was because of the lack of discrimination that the taxes were upheld.

In fact a license tax required for the sale of goods is a tax on the goods themselves. Brennah v. Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. It is a tax on the business. Cooney v. Mountain States Relephone and Telephone Co., 294 U. S. 384, 55 Sup. Ct. 477, 49 L. Ed. 934. And therefore a tax on interstate commerce. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; Sault Ste. Marie v. International Transit Co., 234 U. S. 353, 34 Sup. Ct. 826, 58 L. Ed. 1337. The Method of sale employed by appellant is interstate commerce. Commonwealth of Virginia v. Myer, supra. When an extrastate manufacturer, to escape taxation for the right to sell is forced by the state of sale to come into the state [fol. 13] of sale, or bring assets there for taxation, it is interstate commerce and the tax is void. Bethlehem Motors Corp v. Flynt, supra.

The Exemption Granted Other Peddlers as a Comparison

Sec. 192 exempts peddlers of meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits or other fam-

ily supplies of a perishable nature grown or produced by them, and not purchased for sale. If not grown or produced by them the license tax for peddling is $50.00 for each vehicle used in each county and city. It wholly exempts seafood peddlers as does sec. 192-b, unless they buy the seafood from the persons who take or catch the same, in which instance the fee is $25.00 for each vehicle used in the peddling.

As was noted in Smith v. Cahoon, supra, there is no justification for a distinction between carrying one foodstuff and carrying another. So in the case at bar there is no justification for a distinction between peddling one food and peddling another. What difference could there be in peddling butter, eggs, etc., and peddling bread? The statute emphatically makes one, although it is absolutely obvious that bread is a "family supply of a perishable nature." The Court well knows it is an article of food that rapidly becomes stale, and is sold for immediate consumption. Sinclair v. Hathaway, 57 Mich. 60, 23 N. W. 459. It is the staff of life.

The comparison, noting particularly that peddlers of seafood are qualifiedly exempt from sec. 192 and absolutely from sec. 192 b, and peddlers of agricultural products such as butter, eggs, milk, etc., are exempt from 192 and 192 b if they grow or produce them and taxed lightly as contrasted with appellant, if they do not, completely annihilates the position that the appellant is not an object of discrimination.

Summary

With the proposition noted that statutes imposing license taxes are construed liberally in favor of the citizen against the government Watts v. Comm., 106 Va. 851, 56 S. E. 223; Brown v. Comm., 98 Va. 336, 36 S. E. 485, it is urged that section 192 b of the Tax Code of Virginia, is invalid because:

(a) It violates the 14th Amendment to the Federal Constitution, in denying equal protection of the laws of Virginia [fols. 14-15] to the appellant, and unlawfully discriminates against it.

(b) It violates Art. 1, Sec. 8, Cl. 3, the commerce clause of the said constitution by imposing a burden on interstate commerce.

PRAYER

Petitioner prays that a writ of error and supersedeas may be granted it, and that the errors of the Corporation Court of the City of Winchester, enumerated in the foregoing assignments of error may be corrected, the judgment be reversed and annulled and the case remanded for such further proceedings as justice may require.

Respectfully submitted, R. Gray Williams, J. Sloan Kuykendall, Martin, Seibert and Beall, Attorneys for Appellant.

* * * * * * *

[fol. 16] IN JUSTICE'S COURT OF CITY OF WINCHESTER

WARRANT

COMMONWEALTH OF VIRGINIA,
City of Winchester, To-Wit:

To the Chief of Police, or any of his assistants, of said city:

Whereas, C. P. McVicar, Comm. of Revenue City of Winchester, of said city, has this day made complaint and information on oath, before me, Donald L. Weems, Police Justice of said City, that Caskey Baking Corporation and Correll Brown, on or about 9th day of September, 1938, in said city, did unlawfully violate section 192-b of the Tax Code of Virginia as amended in Chap. 305 of the 1938 Acts of Legislature, in that they did sell or offer for sale goods, wares and merchandise to one J. E. Keffer without having obtained the license required by the aforesaid section of the Tax Code of Virginia.

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me the body of said Caskey Baking Corp. and Correll Brown to answer said complaint and be dealt with according to law.

Given under my hand this 9th day of September, 1938.

Donald L. Weems, Police Justice.

THE COMMONWEALTH

vs.

CASKEY BAKING CORP. and CORRELL BROWN

Executed this 10th day of September, 1938 by arresting the within named Correll Brown, and bringing him before D. L. Weems, Police Justice.

Edwin Smith, Police Officer.

IN JUSTICE'S COURT OF CITY OF WINCHESTER

JUDGMENT OF COURT—September 10, 1938

Judgment, this 10th day of September, 1938, that within named defendant is guilty upon testimony on oath of J. E. [fol. 17] Keffer and C. P. McVicar, and it is adjudged that he pay a fine of $50.00 and costs of $5.25.

D. L. Weems, Police Justice.

IN JUSTICE'S COURT OF CITY OF WINCHESTER

NOTICE OF APPEAL

My judgment above has been appealed from and it is hereby certified this 10th day of September, 1938, to the Corporation Court of this City for trial.

D. L. Weems, Police Justice.

Counsel for defendant Williams and Kuykendall.

IN CORPORATION COURT, CITY OF WINCHESTER

[Title omitted]

STIPULATION OF FACTS—Filed January 28, 1939

Abram P. Staples, W. W. Martin and James P. Reardon, attorneys representing the Commonwealth of Virginia, and Clarence E. Martin, Clarence E. Martin, Jr., R. Gray Williams and J. Sloan Kuykendall, attorneys representing the Caskey Baking Company, Incorporated, a corporation, do

hereby agree and stipulate the following to be the facts upon which this case shall be heard:

1. On the 9th day of September, 1938, the Caskey Baking Company, Incorporated, a corporation chartered under the laws of the State of West Virginia and domiciled at Martinsburg in said State, and also domesticated to do business in the State of Virginia, as hereinafter more fully appears, was engaged in the business of selling and offering for sale bread and other bakery products in the State of Virginia to grocers and other retail dealers. The bread and other bakery products were sold and delivered at one and the same time by defendant's employees from defendant's motor *h*ehicles, and no previous orders therefor were taken from the customers.

[fol. 18] 2. The Caskey Baking Company, Incorporated, on and before September 9, 1938, was domesticated to do business in the State of Virginia under and pursuant to Section 3847 of the Code of Virginia, w*h*ich which it had complied, and it had paid the entrance fee for foreign corporations provided in Section 207 of Chapter 15 of the Tax Code and had paid the annual registration fee prescribed by Section 210 of the Tax Code and had fully complied with the statutes of Virginia applicable in the premises.

3. The defendant, on the aforesaid date, was engaged in selling in the manner described in the first numbered paragraph hereof bread and other bakery products in the City of Winchester, Virginia, and was arrested and prosecuted under and by virtue of a warrant issued by Donald L. Weems, Police Justice of the City of Winchester, Virginia. This warrant was issued upon a complaint made by C. P. McVicar, Commissioner of Revenue of the City of Winchester, Virginia, charging defendant with the violation of Section 192-b of the Tax Code of Virginia, as amended by Chapter 305 of the 1938 Acts of the General Assembly, for this, to-wit:

That it has sold, or offered for sale, goods, wares and merchandise to one J. E. Keffer, a licensed retail merchant in Virginia, without having obtained the license required by the aforesaid section of the Tax Code of Virginia.

The defendant was found guilty and fined in the sum of $50 and costs, from which conviction an appeal was taken, on the 10th day of September, 1938, to the Corporation Court of the City of Winchester, Virginia.

4. The goods, wares and merchandise sold and offered for sale by defendant were manufactured by defendant in the City of Martinsburg, West Virginia, and brought to the State of Virginia by motor vehicles and sold and offered for sale in the manner described in the first numbered paragraphs from place to place in Virginia from said motor vehicles. Defendant operated its motor vehicles in Virginia over regular routes and at regular intervals, selling and offering for sale in the manner described in the first numbered paragraph hereof its bread and other bakery products to grocers and other retail dealers in Winchester and other places in Virginia, all of whom were regular customers of the defendant.

5. Said motor vehicles are the property of the defendant corporation, and were operated by employees of the defendant corporation. These employees were paid a fixed salary.

[fol. 19] 6. The drivers of the vehicles, who actually made the sales and delivered the bread and other bakery products, had no interest in the merchandise, nor in the proceeds from such sales.

7. The goods, wares and merchandise, namely, the bread and other bakery products, were not injurious to the health nor damaging to the morals of the citizens of the State of Virginia.

8. The defendant corporation had no place of business in Virginia except it has designated, pursuant to section 3847 of the Code of Virginia, the office of R. Gray Williams in Winchester, Virginia, as its office in this State, at which all claims due residents of Virginia may be audited, settled and paid; had no property permanently located in Virginia; was not a manufacturer taxable on capital by Virginia under section 73 of the Tax Code of Virginia; was not a distributor of manufactured products in Virginia paying a State license Tax on its purchases; was not a wholesale dealer regularly licensed by Virginia. Defendant has paid no taxes of any kind in Virginia, State or local, including license taxes on its motor Vehicles operated in Virginia, except those described in the second numbered paragraph hereof and a State income tax upon that portion of its net profits, if any, allocable to its Virginia business.

9. Defendant has not secured the license prescribed by section 192-b of the Tax Code of Virginia and did on September 9, 1938, sell and deliver in Winchester, Virginia, to one J. E. Keffer, a licensed retail merchant in Virginia, in the manner described in the first numbered paragraph hereof, bread and other bakery products manufactured by defendant in Martinsburg, West Virginia.

10. The highways in Virginia traveled over by defendant's motor vehicles are owned, operated and maintained by and at the expense of the Commonwealth of Virginia, and the State police officers patrolling said highways are provided and compensated by the said Commonwealth.

11. All of the provisions of State statutes and local laws of Virginia and West Virginia relating to the taxation of (a) corporations, and (b) capital of any trade or business, and (c) merchants, both wholesale and retail, and (d) income, and (e) motor vehicles, and (f) property, are being enforced by the State and local tax authoroities of Virginia and West Virginia respectively.

12. There are a number of other corporations manufacturing goods, wares and merchandise, in States other than Virginia, including corporations manufacturing bread and other bakery products, selling and offering for sale such [fol. 20] manufactured goods, wares and merchandise in Virginia in the same manner and under substantially the same circumstances and facts as are herein described.

13. This stipulation is agreed to without prejudice to the right of either party to object to the admissibility of any of the stipulated facts on such grounds as to either party may appear proper.

Caskey Bakery Company, Incorporated, by R. Gray Williams, Clarence E. Martin, Clarence E. Martin, Jr., J. Sloan Kuykendall. Commonwealth of Virginia, by Abram P. Staples, W. W. Martin, James P. Reardon.

[File endorsement omitted.]

IN CORPORATION COURT, CITY OF WINCHESTER

[Title omitted]

OPINION—Filed January 27, 1940

The Caskey Baking Company, Incorporated, a West Virginia corporation domesticated in Virginia, was convicted of violating section 192-b of the Tax Code of Virginia for peddling without the license required by that statute. An appeal from the magistrate's judgment of guilty was taken to this court and the case has been submitted upon a stipulation of facts. Under reservation in the stipulation, objection is made to the relevancy of paragraphs 10, 11, and 12. No objection is seen to the first two of these, but the third appears to be irrelevant.

The defense asserted is that the statute, upon which the [fol. 21] conviction rests, is unconstitutional because it contravenes the commerce clause (Article 1, Sec. 8, cl. 3) and the equal protection of the law clause (Fourteenth Amendment) of the United States Constitution.

The defendant admittedly engaged in peddling bakery products in Virginia after transporting them from its bakery in West Virginia.

This statute imposes "an annual State license tax on every person, firm and Corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller." It provides that it shall not apply "to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants." The amount of the tax imposed is $100.00 for each vehicle used in the peddling. It is also provided that this license confers authority to peddle throughout the State as a state license, but that towns and cities may impose license taxes for peddling within their corporate limits. Sec. 192-b The Tax Code of Va. 1938: Acts 1932, p. 376; 1938, page 439.

This and related sections of The Tax Code show that vendors who engage in peddling, such as that covered by this section, are thus classified and taxed:

1. Vendors solely engaged in peddling. These are taxed as provided by this section, and may be also required to pay city and town taxes. (Secs. 192-a and 192-b, Tax Code of Va. 1938.)

2. Manufacturers taxable on capital by the State. These are exempt from license tax, state, city, town and county, for peddling their manufactured goods, but they are taxed on their capital. (Secs. 188, 192-b, 73 Tax Code, Va., 1938.)

3. Distributors of manufactured goods and wholesale dealers licensed by the state. These are exempt from state license tax for such peddling (192-b, Tax Code) but are taxable on their purchases (188 Tax Code) by the state, and are also subject to city and town license taxes. (188, 192-a, Tax Code.)

4. Distributors and vendors of motor vehicle fuels and petroleum products, tobacco, or seafood, a farm, a farmer's co-operative association, a producer of agricultural prod-
[fol. 22] ucts. These are exempt from this State license tax. (192-b, Tax Code.)

The terms of this statute limit it to domestic commerce—peddling in Virginia; they do not invade the sphere of interstate commerce; they do not discriminate as between the origin of the peddler nor as to where the peddled wares originate. The defendant, a West Virginia corporation, is required to pay a tax for peddling and so is a Virginia corporation; the tax applies to all peddlers, regardless of where they or their goods came from.

Emphasis should be focused upon the fact that the defendant seeks to engage in domestic commerce within the state, and that it attacks a tax imposed upon that commerce which the state has the right to regulate and to tax. The defendant, it must be remembered, is not affected by this law in its interstate commerce. This statute does not attempt to impose a tax, for instance, upon deliveries made by defendant in Virginia for merchandise it has sold on orders. The defendant wishes to transport its merchandise into the state and peddle it there; each of its trucks then becoming a travelling store in Virginia. That is the business which this statute taxes.

It has long since been settled that peddling is domestic, not interstate commerce; and that it may be taxed by the state. Howe Machine Co. v. Gage, 100 U. S. 676, 26 L. Ed. 734; Emert. v. Missouri, 156 U. S. 296, L. Ed. 430; Wagner v. Covington, 251, U. S. 95, 64 L. Ed. 734.

In the case last cited above this statement epitomized the decisions on this subject:

"We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state, a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states. It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation or direct burden upon interstate commerce, although impartially with respect to goods manufactured without as well as within the state, and does not conflict with the commerce clause."

In Emert v. Missouri, supra, in which the opinion by Mr. Justice Gray reviews this subject, this is said of the peddler: "The only business or commerce in which he was engaged was internal and domestic; and, so far as it appears, the only goods in which he was dealing had become [fol. 23] a part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the state."

It is contended, however, that the exemption in the statute, in favor of manufacturers taxable on capital, has the effect of exempting resident manufacturers and their products from this taxation; and that this is discriminatory as to non-residents and results in a direct burden upon interstate commerce. Cited, is a line of cases holding that state taxation which discriminates against foreign products or persons is violative of the commerce clause. Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Morrill v. Wisconsin 154 U. S. 626, 14 Sup. Ct. 1206, 23 L. Ed. 1009; Minnesota v. Blasuis 290 U. S. 1, 78 L. Ed. 131; Brown v. Maryland, 12 Wheat 419, 6 L. Ed. 678; Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915.

But that line of cases is based upon the holding that the laws in question, either in terms or effect, imposed a direct

burden upon interstate commerce. Certainly, in terms, this statute does not do that; nor, in effect, does it appear to do so. Rather, it seems, this case is to be ruled by the principals of Armour and Co. v. Virginia, 246 U. S. 1, 62 L. Ed. 547, and same case in 118 Va. 242, 87 S. E. 610; Reyman Brewing Co. v. Brister, 179 U. S. 446, 45 L. Ed. 269; New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323.

In Armour and Co. v. Virginia, the statute exempted from a merchants' license tax, manufacturers taxed on capital by the state, who offered for sale at the place of manufacture, goods, wares, and merchandise manufactured by them. Armour and Company, a corporation of New Jersey and qualified to do business in Virginia, had no manufactory in Virginia but did have distributing houses for marketing its merchandise. These were required to pay the merchants' license tax. The constitutionality of the taxing statute was challenged upon the same grounds asserted in the case now before this court. Armour and Company contended that the exemption noted discriminated against the foreign manufacturer because having no place of manufacture within the state, it could not have advantage of the exemption enjoyed by the domestic manufacturer. The Supreme Court of Appeals of Virginia held that here was no such discrimination and that the statute was constitutional. The opinion cited, on this question, the cases last above referred to, and distinguished Commonwealth v. Myer, supra, holding it inapplicable.

[fol. 24] Upon appeal to the Supreme Court of the United States, this decision was sustained, and upon the question of discrimination, the opinion, in part, stated that: "The Error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed, or because of the unlawful discriminations which its provisions express or by operation necessarily bring about, and the indirect and wholly negligible influence on interstate commerce, even if in some respects detrimental, arising from a statute which there was power to enact, and in which there was an absence of all discrimination, whether express or implied, as the result of the necessary operation and effect of its provisions. The distinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the

court below, that principal as applied in adjudged cases is here directly applicable and authoritatively controlling."

The opinion cited New York v. Roberts and Reyman Brewing Co. v. Brester, supra, and then concluded: "In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they all rest upon the conclusion that a direct burden on interstate commerce arose from statutes inherently void for want of power, or, if within the power possessed, were intrinsicately repugnant to the commerce clause because of discriminations against interstate commerce which they contained."

In further comment upon the assertion that the statute discriminated against the foreign manufacturer, the opinion stated: "It follows, therefore, that if the asserted disadvantage be real, and not imiginary, it would be one not direct, because not arising from the operation and effect of the statute, but indirect, as a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the constitution, which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government."

The case of New York v. Roberts, supra, involved the asserted unconstitutionality, upon the ground of illegal discrimination between domestic and foreign corporations, of a tax statute of the state of New York which imposed a tax on the amount of capital, employed within the state, by corporations doing business therein, and containing an [fol. 25] exemption from the tax in favor of corporations wholly engaged in manufacturing within the state. The challenge to this statute was made by a corporation of the state of Michigan, which had qualified to do business in New York. It manufactured its products outside of that state and sent them into it for sale in the original packages at its warehouse there.

"It is true," said the court, "Manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are excepted from this tax; but such exemption is not restricted to New York but includes corporations of other states as well, when wholly engaged in manufacturing within the state"—"It is said that the operation of that portion of this taxing law,

which exempts from a business tax corporations which are wholly engaged in manufacturing within the state of New York, is to encourage manufacturing corporations which seek to do business in that state to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts."

In Reymand Brewing Co. v. Brister, supra, a tax statute of Ohio was contended to be unconstitutional upon the same grounds asserted in the case now before this court, because it discriminated in favor of manufacturers in Ohio as against those with plants located outside that state. There was in the statute an exemption from the tax in favor of the manufacturer who sold at the manufactory, and this was asserted to be discriminatory. New York v. Roberts was cited in holding that this contention was not sound and that the statute was valid.

It has been concluded, therefore, that the exemptions, in the statute here discussed, are not such discrimination as to render the statute violative of the commerce clause. Neither does it seem that denial of the equal protection of the law is to be found in the exemptions provided for by this statute. These exemptions form but a part of a correlated system of tax classification, as before stated; and they must be so considered in testing them. Is there not a reasonable basis for placing in separate classes the manufacturer, the distributor and wholesaler, and the itinerant vendor or peddler? Is hostile discrimination apparent because the manufacturer, who is taxable upon his basic capital, is not also taxed by a license tax for sending his products out through the state for sale and delivery? Must he be taxed, also, for this incidental operation, notwith- [fol. 26] standing he is taxed basically in another form, just because a peddler, who is not taxable as a manufacturer, must pay a license tax for peddling? Must a wholesale dealer or distributor, taxable on purchases, be required to pay an additional license tax for selling, and delivering this taxed merchandise, in order to conform with the tax required of the peddler, who is not taxed on his purchases?

It is to be noted that the defendant is neither a manufacturer, a wholesale dealer, nor a distributor, in Virginia; and that it therefore cannot be taxed as such. But there is nothing in the tax laws of Virginia to prevent it from

becoming one of these, in which event it would be entitled to the exemptions applicable because it would be taxed in another form. Defendant is subject to the peddlers, tax, because it apparently prefers to remain outside these classes; remaining outside it would not be taxed at all unless by the license tax imposed.

In the three cases, last above referred to, it was contended, upon reasoning like that here applied by defendant, that the exemptions from taxation were discriminatory and in denial of the equal protection of the law. But the contention was not sustained. The Principles applied in those cases, in reaching that decision, are applicable here, and with the same result.

Inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not limit the power of the state to make any reasonable classification of property, occupations, persons or corporations, for purposes of taxation. It merely forbids inequality caused by clearly arbitrary action, particularly such as is attributable to hostile discrimination against particular persons or classes.

F. S. Royster Guano Co. v. Comm. of Va., 253 U. S. 412, 64 L. Ed. 989; Beers v. Glynn, 211 U. S. 477, 53 L. Ed. 290; Merchants and M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892; Va. Electric and Power Co. v. Commonwealth, 169 Va. 688, 194 S. E. 775; Farmers & Mechanics Ben's. Fire Ins. Ass'n of Roanoke and Botetourt Counties v. Horton, 157 Va. 114, 160 S. E. 315; Leonard v. Maxwell, —, N. C. —, M 3 S. E. 2nd 316. Nor does this clause forbid exemption or classification based upon a principal of equalization of the tax load, whereby a class is exempted from an additional tax because it is taxed in another way. In Re Richmond Linen Supply Co., 291 U. S. 641, 78 L. Ed. 1039; Va. Electric & Power Co. v. Common- [fol. 27] wealth, 169 Va. 688, 194 S. E. 775; Richmond Linen Supply Co. v. Lynchburg, 160 Va. 644, 169 S. E. 554.

The exemptions grouped as class 4 in the summary of this tax classification, stated in the beginning of this discussion, need not be discussed. The defendant is not affected by these exemptions. They are, however, sustainable. Va. Electric & Power Co. v. Commonwealth, supra; Carpel v. Richmond, 162 Va. 833; Leonard v. Maxwell, supra.

In testing this statute the rule is to presume it to be constitutional. The objections asserted against its constitutionality, when measured by this standard, do not appear to be sustainable. For the reasons which have been indicated, it has been concluded that section 192-b of the Tax Code of Virginia is a valid enactment. Since the defendant admits that it has violated that section, it is therefore guilty as charged in the warrant, and it shall be so adjudged.

Philip Williams, Judge.

[File endorsement omitted.]

IN CORPORATION COURT, CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

VS.

CASKEY BAKING COMPANY, INC.

JUDGMENT—January 27, 1940

This day came the Caskey Baking Company, Incorporated, charged upon a warrant by the Commonwealth of Virginia with a violation of section 192-b of its Tax Code. A Jury was waived and the court having fully heard and considered the facts stipulated by the parties and the arguments of their counsel submitted in written briefs, is of the opinion, for reasons stated in writing and made a part of this judgment by reference, that section 192-b of the Tax [fols. 28-29] Code does not violate Article 1, Section 8, Clause 3 (the commerce clause) nor the Fourteenth Amendment (the equal protection of the law clause) of the Constitution of the United States, and that said section of the Tax Code is a valid enactment.

It is adjudged and ordered that the Caskey Baking Company, Incorporated, is guilty of violating section 192-b of the Tax Code of Virginia, for that the said Company failed to procure the license and pay the tax required and imposed thereby and that it peddled goods, wares and merchandise in the State of Virginia by selling and delivering the same at the same time to a retailer at other than a definite place of business operated by the seller, as charged in the warrant, and that the said Caskey Baking Company,

Incorporated, shall pay a fine of Fifty Dollars ($50.00) and the costs of this prosecution.

The defendant objected and excepted to the entry of this judgment upon the ground that it is contrary to the law and the evidence, and made a motion that the execution be suspended pending the presentation of a petition for a writ of error to the judgment. Thereupon, it is ordered that the execution of this judgment be suspended for a period of sixty days from the date of its entry, so that during such period the defendant may petition for a writ of error to the Supreme Court of Appeals of Virginia, and thereafter such suspension shall continue until such petition is acted on by the Supreme Court of Appeals if such petition is actually filed within the specified time; provided, however, that the defendant or someone for it shall give or file a bond in the Clerk's Office of this court, with surety to be approved by the Clerk thereof, in the penalty of three hundred dollars and conditioned and executed according to the provisions of a section 6338 of the Code of Virginia as amended.

(Signed) Philip Williams, Judge.

Recorded in Law Order Book 13, page 162.

[fol. 30] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 31-32] IN SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 2300

CASKEY BAKING COMPANY, INCORPORATED, Plaintiff in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error

Upon a writ of error and supersedeas to a judgment rendered by the Corporation Court of the city of Winchester on the 27th day of January, 1940.

JUDGMENT—September 5, 1940

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of

opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said corporation court.

[fol. 33] IN SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the justices.

[Title omitted]

Opinion by Justice Edward W. Hudgins

From the Corporation Court of the City of Winchester,
Philip Williams, Judge

OPINION—September 5, 1940

Caskey Baking Company, Incorporated, was convicted on the charge of peddling without first having secured a license from the Commonwealth as required by section 192-b of the Tax Code. To that judgment of conviction this writ of error was allowed.

Plaintiff in error is a West Virginia corporation and domesticated in Virginia. It has no place of business in this State except a statutory office in the office of R. Gray Williams, an attorney, at Winchester. It manufactures bakery products (not injurious to health nor damaging to morals) in West Virginia, and sells these products in Virginia to grocers and other retail dealers. The sales are made by employees of the plaintiff in error from a stock of manufactured goods carried by trucks from place to place. These trucks are operated by it over regular routes in Virginia at regular intervals. Sales and deliveries of the bakery products are made at one and the same time and without having secured previous orders from the customers. In other words, plaintiff in error is in Virginia nothing more nor less than an itinerant peddler of merchandise manufactured by it in West Virginia.

The same arguments made in this court were presented to the trial judge, the Honorable Philip Williams, who, after

mature consideration, prepared and filed an opinion that so fully and ably discusses the questions raised that we are content to adopt it as our own. This opinion, in part, is as follows:

"The defense asserted is that the statute, upon which the conviction rests, is unconstitutional because it contravenes the commerce clause (Article 1, Sec. 8, cl. 3) and the equal protection of the law clause (Fourteenth Amendment) of the United States Constitution.

[fol. 34] "The defendant admittedly engaged in peddling bakery products in Virginia after transporting them from its bakery in West Virginia.

"This statute imposes 'an annual State license tax on every person, firm and Corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller.' It provides that it shall not apply 'to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants.' The amount of the tax imposed is $100.00 for each vehicle used in the peddling. It is also provided that this license confers authority to peddle throughout the State as a state license, but that towns and cities may impose license taxes for peddling within their corporate limits. See 192-b The Tax Code of Va. 1938; Acts 1932, p. 376, 1938, p. 439.

"This and related sections of The Tax Code show that vendors who engage in peddling, such as that covered by this section, are thus classified and taxed:

"1. Vendors solely engaged in peddling. These (with certain exceptions) are taxed as provided by this section, and may be also required to pay city and town taxes. (Secs. 192-a and 192-b, Tax Code of Va. 1938).

"2. Manufacturers taxable on capital by the State. These are exempt from license tax, state, city, town and county, for peddling their manufactured goods, but they are taxed on their capital. (Secs. 188, 192-b, 73 Tax Code, Va., 1938).

"3. Distributors of manufactured goods and wholesale dealers licensed by the state. These are exempt from state license tax for such peddling (192-b, Tax Code) but are [fol. 35] taxable on their purchases (188 Tax Code) by the state, and are also subject to city and town license taxes. (188, 192-a, Tax Code.)

"4. Distributors and vendors of motor vehicle fuels and petroleum products, tobacco, or seafood, a farm, a farmer's cooperative association, a producer of agricultural products. These are exempt from this State license tax. (192-b, Tax Code.)

"The terms of this statute limit it to domestic commerce—peddling in Virginia; they do not invade the sphere of interstate commerce; they do not discriminate as between the origin of the peddler nor as to where the peddled wares originate. The defendant, a West Virginia corporation, is required to pay a tax for peddling and so is a Virginia corporation; the tax applies to all peddlers, regardless of where they or their goods came from.

"Emphasis should be focused upon the fact that the defendant seeks to engage in domestic commerce within the state, and that it attacks a tax imposed upon that commerce which the state has the right to regulate and to tax. The defendant, it must be remembered, is not affected by this law in its interstate commerce. This statute does not attempt to impose a tax, for instance, upon deliveries made by defendant in Virginia for merchandise it has sold on orders. The defendant wishes to transport its merchandise into the state and peddle it there; each of its trucks then becoming a travelling store in Virginia. That is the business which this statute taxes.

"It has long since been settled that peddling is domestic, not interstate commerce; and that it may be taxed by the state. Howe Machine Co. v. Gage, 100 U. S. 676, 26 L. Ed. 734; Emert v. Missouri, 156 U. S. 296, 39 L. Ed. 430; Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157.

"In the case last cited above this statement epitomized the decisions on this subject:

'We have, then, a state tax upon the business of an itinerant vendor of goods as carried on within the state— [fol. 36] a tax applicable alike to all such dealers, irrespective of where their goods are manufactured, and without discrimination against goods manufactured in other states.

It is settled by repeated decisions of this court that a license regulation or tax of this nature, imposed by a state with respect to the making of such sales of goods within its borders, is not to be deemed a regulation of or direct burden upon interstate commerce, although enforced impartially with respect to goods manufactured without as well as within the state, and does not conflict with the "commerce clause".'

"In Emert v. Missouri, supra, in which the opinion by Mr. Justice Gray reviews this subject, this is said of the peddler: 'The only business or commerce in which he was engaged was internal and domestic; and, so far as it appears, the only goods in which he was dealing had become a part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the state.'

"It is contended, however, that the exemption in the statute, in favor of manufacturers taxable on capital, has the effect of exempting resident manufacturers and their products from this taxation; and that this is discriminatory as to non-residents and results in a direct burden upon interstate commerce. Cited, is a line of cases holding that state taxation which discriminates against foreign products or persons is violative of the commerce clause. Webber v. Virginia, 103 U. S. 344, 26 L. Ed. 565; Walton v. Missouri, 91 U. S. 275, 23 L. Ed. 347; Morrill v. Wisconsin, 154 U. S. 626, 14 Sup. Ct. 1206, 23 L. Ed. 1009; Minnesota v. Blasuis, 290 U. S. 1, 78 L. Ed. 131; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678; Commonwealth v. Myer, 92 Va. 809, 23 S. E. 915.

"But that line of cases is based upon the holding that the laws in question, either in terms or effect, imposed a direct burden upon interstate commerce. Certainly, in terms, this statute does not do that; nor, in effect, does it appear to [fol. 37] do so. Rather, it seems, this case is to be ruled by the principles of Armour and Co. v. Virginia, 246 U. S. 1, 62 L. Ed. 547, and same case in 118 Va. 242, 87 S. E. 610; Reyman Brewing Co. v. Brister, 179 U. S. 446, 45 L. Ed. 269; New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323.

"In Armour and Co. v. Virginia, the statute exempted from a merchants' license tax, manufacturers taxed on capital by the state, who offered for sale at the place of manufacture goods, wares, and merchandise manufactured by them. Armour and Company, a corporation of New Jersey

and qualified to do business in Virginia, had no manufactory in Virginia but did have distributing houses for marketing its merchandise. These were required to pay the merchants' license tax. The constitutionality of the taxing statute was challenged upon the same grounds asserted in the case now before this court. Armour and Company contended that the exemption noted discriminated against the foreign manufacturer because, having no place of manufacture within the state, it could not have advantage of the exemption enjoyed by the domestic manufacturer. The Supreme Court of Appeals of Virginia held that there was no such discrimination and that the statute was constitutional. The opinion cited, on this question, the cases last above referred to, and distinguished Commonwealth v. Myer, supra, holding it inapplicable.

"Upon appeal to the Supreme Court of the United States, this decision was sustained, and upon the question of discrimination, the opinion, in part, stated that: 'The error of the argument results from confounding the direct burden necessarily arising from a statute which is unconstitutional because it exercises a power concerning interstate commerce not possessed, or because of the unlawful discriminations which its provisions express or by operation necessarily bring about, and the indirect and wholly negligible influence on interstate commerce, even if in some respects detrimental, arising from a statute which there was power to enact, and in which there was an absence of all discrimination, whether express or implied, as the result of the necessary operation and effect of its provisions. The dis- [fol. 38] tinction between the two has been enforced from the beginning as vital to the perpetuation of our constitutional system. Indeed, as correctly pointed out by the court below, that principle as applied in adjudged cases is here directly applicable and authoritatively controlling.'

"The opinion cited New York v. Roberts and Reyman Brewing Co. v. Brister, supra, and then concluded: 'In saying this we have not overlooked or failed to consider the many cases cited in the argument at bar on the theory that they are to the contrary, when in fact they all rest upon the conclusion that a direct burden on interstate commerce arose from statutes inherently void for want of power, or, if within the power possessed, were *intrinsicately* repugnant to the commerce clause because of discriminations against interstate commerce which they contained.'

"In further comment upon the assertion that the statute discriminated against the foreign manufacturer, the opinion stated: 'It follows, therefore, that if the asserted disadvantage be real, and not imaginary, it would be one not direct, because not arising from the operation and effect of the statute, but indirect, as a mere consequence of the situation of the persons and property affected and of the nondiscriminating exercise by the state of power which it had a right to exert without violating the constitution, which is indeed but to say that the disadvantage relied upon, if any, is but the indirect result of our dual system of government.'

"The case of New York v. Roberts, supra, involved the asserted unconstitutionality, upon the ground of illegal discrimination between domestic and foreign corporations, of a tax statute of the state of *New York* which imposed a tax on the amount of capital, employed within the state, by corporations doing business therein, and containing an exemption from the tax in favor of corporations wholly engaged in manufacturing within the state. The challenge to this statute was made by a corporation of the state of Michigan, which had qualified to do business in New York. It [fol. 39] manufactured its products outside of the state and sent them into it for sale in the original packages at its warehouse there.

" 'It is true,' said the court, 'Manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are excepted from this tax; but such exemption is not restricted to New York but includes corporations of other states as well, when wholly engaged in manufacturing within the state'—'It is said that the operation of that portion of this taxing law, which exempts from a business tax corporations which are wholly engaged in manufacturing within the state of New York, is to encourage manufacturing corporations which seek to do business in that state to bring their plants into New York. Such may be the tendency of the legislation, but so long as the privilege is not restricted to New York corporations, it is not perceived that thereby any ground is afforded to justify the intervention of the Federal courts.'

"In Reyman Brewing Co. v. Brister, supra, a tax statute of Ohio was contended to be unconstitutional upon the same grounds asserted in the case now before this court, because it discriminated in favor of manufacturers in Ohio as

against those with plants located outside that state. There was in the statute an exemption from the tax in favor of the manufacturer who sold at the manufactory, and this was asserted to be discriminatory. New York v. Roberts was cited in holding that this contention was not sound and that the statute was valid.

"It has been concluded, therefore, that the exemptions, in the statute here discussed, are not such discriminations as to render the statute violative of the commerce clause. Neither does it seem that denial of the equal protection of the law is to be found in the exemptions provided for by this statute. These exemptions form but a part of a correlated system of tax classification, as before stated; and they must be so considered in testing them. Is there not a reasonable basis for placing in separate classes the manufacturer, the distributor and wholesaler, and the itinerant [fol. 40] vendor or peddler? Is hostile discrimination apparent because the manufacturer, who is taxable upon his basic capital, is not also taxed by a license tax for sending his products out through the state for sale and delivery? Must he be taxed, also, for this incidental operation, notwithstanding he is taxed basically in another form, just because a peddler, who is not taxable as a manufacturer, must pay a license tax for peddling? Must a wholesale dealer or distributor, taxable on purchases, be required to pay an additional license tax for selling and delivering this taxed merchandise, in order to conform with the tax required of the peddler, who is not taxed on his purchases?

"It is to be noted that the defendant is neither a manufacturer, a wholesale dealer, nor a distributor, in Virginia; and that it therefore cannot be taxed as such. But there is nothing in the tax laws of Virginia to prevent it from becoming one of these, in which event it would be entitled to the exemptions applicable because it would be taxed in another form. Defendant is subject to the peddlers tax, because it apparently prefers to remain outside these classes; remaining outside it would not be taxed at all unless by the license tax imposed.

"In the three cases, last above referred to, it was contended, upon reasoning like that here applied by defendant, that the exemptions from taxation were discriminatory and in denial of the equal protection of the law. But the contention was not sustained. The principles applied in those

cases, in reaching that decision, are applicable here, and with the same result.

"Inequalities or exemptions in state taxation are not forbidden by the equal protection clause of the Fourteenth Amendment. That clause does not limit the power of the state to make any reasonable classification of property, occupations, persons or corporations, for purposes of taxation. It merely forbids inequality caused by clearly arbitrary action, particularly such as is attributable to hostile discrimination against particular persons or classes.

[fol. 41] "F. S. Royster Guano Co. v. Comm. of Va., 253 U. S. 412, 64 L. Ed. 989; Beers v. Glynn, 211 U. S. 477, 53 L. Ed. 290; Merchants and M. Nat. Bank v. Pennsylvania, 167 U. S. 461, 42 L. Ed. 236; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892; Va. Electric and Power Co. v. Commonwealth, 169 Va. 688, 194 S. E. 775; Farmers & Mechanics Ben's Fire Ins. Assn. of Roanoke and Botetourt Counties v. Horton, 157 Va. 114, 160 S. E. 315; Leonard v. Maxwell, — N. C. —, 3 S. E. (2nd) 316. Nor does this clause forbid exemption or classification based upon a principle of equalization of the tax load, whereby a class is exempted from an additional tax because it is taxed in another way. In Re Richmond Linen Supply Co., 291 U. S. 641, 78 L. Ed. 1039; Va. Electric & Power Co. v. Commonwealth, 169 Va. 688, 194 S. E. 775; Richmond Linen Supply Co. v. Lynchburg, 160 Va. 644, 169 S. E. 554.

"The exemptions grouped as class 4 in the summary of this tax classification, stated in the beginning of this discussion, need not be discussed. The defendant is not affected by these exemptions. They are, however, sustainable. Va. Electric & Power Co. v. Commonwealth, supra; Carpel v. Richmond, 162 Va. 833; Leonard v. Maxwell, supra.

"* * * For the reasons which have been indicated, it has been concluded that section 192-b of the Tax Code of Virginia is a valid enactment. Since the defendant admits that it has violated that section, it is therefore guilty as charged in the warrant, and it shall be so adjudged".

Mr. John T. Wingo, an attorney of Richmond, Virginia, by leave of court filed a brief as amicus curiae. The only point advanced in his brief that is not covered by the foregoing opinion is that section 192-b of the Tax Code discriminates against plaintiff in error and others similarly

situated, in that they are subject to a local license tax in each municipality for peddling to retailers while manufacturers and distributors who are otherwise taxed are exempt from the imposition of a local license.

The Attorney General, in dealing with this phase of the case, said: "It will be time enough to pass on the validity of a local license when such a license is challenged. Even if a local license were imposed and held to be invalid, such [fol. 42] a holding would not necessarily have any bearing on the validity of the State license. It will be remembered that one of the reasons for exempting a manufacturer taxable on capital from the State license is that such manufacturer pays other *State* taxes, but this may not be a reason for exemption from *local* licenses.

"Furthermore, section 192-b *does not levy any* local license; it simply says that 'nothing herein contained shall prevent' the localities from imposing licenses. Indeed, it is questionable whether appellant is subject to local licenses. Section 192-a of the Tax Code authorizes the imposition of local licenses on peddling to retailers. The section expressly excepts from the liability, however, 'a producer or manufacturer', whether within or without the State, and does not contain the condition 'taxable on capital by this State'. Appellant is both a producer and manufacturer and comes within the exception".

The judgment of the trial court is Affirmed.

[fol. 43] [File endorsement omitted]

[fol. 44] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

PETITION FOR RE-HEARING—Filed October 3, 1940

To the Supreme Court of Appeals of Virginia:

With due deference to this Honorable Court appellants are aggrieved by the judgment herein, assign error to the judgment of the Court, pray that the judgment be set aside and that this Court will rehear and review this case for the reasons hereinafter set forth.

[fols. 45-48] Hereafter in this petition the appellant will be designated for convenience as the "Baking Company" and the Commonwealth of Virginia will be designated as the "Commonwealth".

The errors assigned by the Baking Company in this case were these, to-wit:

1. Section 192b of the Tax Code of Virginia, as amended by the Acts of 1938, Chapter 305, as applied to the Baking Company, is unconstitutional and void, in that

(a) It discriminates against the Baking Company;
(b) It denies to the Baking Company equal protection of the laws of Virginia;
(c) It places an improper burden on interstate commerce.

2. By enacting the statute, having reference to Section 73 of the Tax Code, the General Assembly usurped the powers of the Congress of the United States, under Article 1, Section 8, Clause 3 of the Federal Constitution, in that Congress alone has the power to regulate commerce between the States.

[fol. 49] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

MINUTE ENTRY OF FILING PETITION FOR REHEARING—October 3, 1940

The petition of plaintiff in error in this cause for a rehearing of the judgment rendered by this court on the 5th day of September, 1940, was this day received and the filing thereof is here noted of record.

IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—October 16, 1940

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 5th day of September, 1940, and grant a rehearing thereof, the prayer of the said petition is denied.

[fol. 50] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—Filed December 4, 1940

To the Chief Justice of the Supreme Court of Appeals of Virginia:

Your petitioner, Caskey Baking Company, Inc., a corporation, respectfully shows:

Your petitioner is the appellant in the above entitled cause.

On the 10th day of September, 1938, your petitioner was arrested by virtue of a warrant issued by Donald L. Weems, Police Justice of the City of Winchester, Commonwealth of Virginia, charging your petitioner with violating sec. 192 b of the Tax Code of the Commonwealth of Virginia, as amended by the Acts of 1928, in that your petitioner did offer its goods and merchandise for sale to a licensed retail dealer, in said City, without having obtained the license required said *said* sec. 192 b of the Tax Code of Virginia.

Upon conviction and the imposition of a fine by the aforesaid Police Justice, your petitioner appealed to the Corporation Court of the City of Winchester, Virginia.

[fol. 51] It was contended by your petitioner that said sec. 192 b of the Tax Code of Virginia, was void as being repugnant to the Constitution of the United States. The Corporation Court found that the statute was not repugnant to the Constitution of the United States, and on the 27th day of January, 1940, entered an order upholding the validity thereof, and adjudging your petitioner guilty as charged in the warrant.

A writ of error was presented to the Supreme Court of Appeals of Virginia, where the validity of the said sec. 192 b of the Tax Code of Virginia, as amended, was again upheld as not being repugnant to the Constitution of the United States. The judgment of the Corporation Court was unanimously affirmed by an order made and entered on the 5th day of September, 1940. On the 16th day of October, 1940, the Supreme Court of Appeals of Virginia refused a petition for rehearing filed by your petitioner.

That the Supreme Court of Appeals of Virginia is the highest Court of said State in which a decision in this suit can be had.

That in said action there is drawn in question the validity of a statute of the Commonwealth of Virginia, on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates art. 1, sec. 8, cl. 3, of the Constitution, and the Fourteenth Amendment of the Constitution of the United States.

[fol. 52] That, therefore, in accordance with sec. 237 (a) of the Judicial Code, as amended, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which under the legislation in force when the Act of January 31st, 1928, was passed, to-wit, under sec. 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for an allowance of an appeal from the said Supreme Court of Appeals of Virginia, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of Appeals of Virginia may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of Appeals of Virginia, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law; that an order be made touching the security to be required of the petitioner; that the bond or supersedeas tendered by the petitioner be approved, and that the [fol. 53] said appeal may operate as a supersedeas.

R. Gray Williams, Winchester, Va., Clarence E. Martin, Martinsburg, W. Va., Martin, Seibert and Beall, Martinsburg, W. Va., Attorneys for Petitioner-Appellant.

[File endorsement omitted.]

Service of the above petition accepted on behalf of Commonwealth of Virginia this 4th day of December, 1940.

Abram P. Staples, Attorney General of Virginia.

[fol. 54] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed December 4, 1940

The petitioner assigns the following errors in the record and proceedings in this cause:

1. That the Supreme Court of Appeals of Virginia erred in refusing to reverse the judgment of the Corporation Court of the City of Winchester, Virginia.

2. That the Supreme Court of Appeals of Virginia erred in holding that Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, is not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States.

3. That the Supreme Court of Appeals of Virginia erred in holding that the statute, Section 192 b, as amended by the Acts of 1938, Chapter 305 of the Tax Code of Virginia, does not place an improper burden on interstate commerce.

4. That the Supreme Court of Appeals of Virginia erred in holding that said Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, does not abridge the rights of the petitioner, guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States in that said Court refused to accept the petitioners contention that said statute,

(a) Discriminates in favor of resident manufacturers against non-resident manufacturers.

[fol. 55] (b) Denies to the petitioner the equal protection of the laws of Virginia.

(c) Discriminates in favor of resident peddlers against non-resident peddlers.

Prayer for Reversal

For which errors, Caskey Baking Company, Inc., appellant, prays that the judgment of the Supreme Court of

Appeals of Virginia, dated September 5, 1940, upon which rehearing was denied on October 16th, 1940, in the above entitled action be reversed and dismissed, and a judgment rendered in favor of appellant for costs.

R. Gray Williams, Martin, Seibert and Beall, Clarence E. Martin, Attorneys for Appellant.

[File endorsement omitted.]

Service of the above assignment of errors accepted this 4th day of December, 1940, for Commonwealth of Virginia.

Abram P. Staples, Attorney General of Virginia.

[fol. 56] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal—December 4, 1940

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Appeals of the State of Virginia on the 5th day of September, 1940, in which a petition for rehearing was refused on the 16th day of October, 1940, and from each and every part thereof, now having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and it is hereby allowed to the Supreme Court of the United States from the Supreme Court of Appeals of Virginia, in the above entitled action; and

It is further ordered that the Clerk of the Supreme Court of Appeals of Virginia, within forty days from this date, shall prepare and certify a transcript of material parts of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States under his hand and the seal of said Court, which parts of the record shall be designated by proecipe or stipulations of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

[fols. 57-58] It is further ordered that the appellant shall give a good and sufficient bond for costs and supersedeas in the sum of $500.00, that said appellant shall prosecute said appeal to effect and answer all damages and costs if it fail to make its plea good, and that said supersedeas bond, when filed and approved, shall stay the sending down of the mandate herein and all proceedings in this action until the final disposal of this cause by the Supreme Court of the United States.

Henry W. Holt, Acting Chief Justice of the Supreme Court of Appeals of Virginia.

December 4th 1940.

O. K.: A. P. S.

Service of the above order accepted for the Commonwealth of Virginia this 4th day of December, 1940.

Abram P. Staples, Attorney General of Virginia.

[fol. 59] Cost Bond on appeal for $500.00 approved and filed Dec. 4, 1940, omitted in printing.

[fol. 60] Citation in usual form showing service on Abram P. Staples omitted in printing.

[fol. 61] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

APPELLANT'S PRAECIPE FOR RECORD ON APPEAL

To the Clerk of the Supreme Court of Appeals of Virginia.

SIR:

You will please prepare transcript of the record to be transmitted to the Supreme Court of the United States in pursuance to the appeal heretofore taken in this case, and include therein the following:

1. Petition for writ of error to the Supreme Court of Appeals of Virginia by Caskey Baking Company, Inc., a corporation, beginning on page 1 of your printed record No. 2300, to and including page 3 thereof.

2. All of the remainder of the record beginning on page 16 thereof to and including page 28 thereof.

3. Opinion of the Supreme Court of Appeals of Virginia, dated September 5th, 1940, together with order of that date.

4. The part of the petition for rehearing filed on the — day of September, 1940, showing errors assigned on page 2 of the printed petition.

[fol. 62] 5. Order of Court of October 16th, 1940, refusing to rehear.

6. Petition for Appeal to the Supreme Court of the United States, with admission of service thereon.

7. Assignment of Errors and Prayer for Reversal, with admission of service thereon.

8. Order allowing appeal to the Supreme Court of the United States, with admission of service thereon.

9. Citation on appeal to Appellee, with admission of service thereon.

10. Jurisdictional statement with admission of service thereon.

11. Statement to Appellee directing its attention to the provisions of paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, with admission of service thereon.

12. This praecipe, with admission of service thereon, and Clerk's certificate to transcript.

R. Gray Williams, J. Sloan Kuykendall, Winchester, Virginia. Martin, Seibert & Beall, Martinsburg, West Va., Counsel for Appellant. R. Gray Williams, Clarence E. Martin, of Counsel.

Service of the above praecipe is hereby accepted for and on behalf of the Commonwealth of Virginia, this 7th day of December, 1940.

Abram P. Staples, Attorney General of Virginia.

[fol. 63] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

APPELLEE'S PRAECIPE FOR RECORD ON APPEAL

To the Clerk of the Supreme Court of Appeals of Virginia.

SIR:

In addition to the contents of the record in the above matter designated in praecipe of appellant you will please include the following:

1. The remaining portion of the petition for writ of error in this case filed with the Supreme Court of Appeals of Virginia beginning on page 4 of printed record No. 2300 and ending at the middle of page 14 of said record.

2. This praecipe.

Abram P. Staples, Attorney General of Virginia, Counsel for Appellee.

Service accepted of the above praecipe this 10th day of December, 1940.

R. Gray Williams, Clarence E. Martin, Attorneys for Appellant.

December 10, 1940.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed February 13, 1941

To the Honorable Justices of the Supreme Court of the United States:

Comes the petitioner and appellant in the above named action and respectfully says that the following is a statement of the points upon which it intends to rely before this honorable Court:

1. That the Supreme Court of Appeals of Virginia erred in refusing to reverse the judgment of the Corporation Court of the City of Winchester, Virginia.

[fol. 66] 2. That the Supreme Court of Appeals of Virginia erred in holding that Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, is not repugnant to Article 1, Section 8, Clause 3 of the Constitution of the United States.

3. That the Supreme Court of Appeals of Virginia erred in holding that the statute, Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, does not place an improper burden on interstate commerce.

4. That the Supreme Court of Appeals of Virginia erred in holding that said Section 192 b, as amended by the Acts of 1938, Chapter 305, of the Tax Code of Virginia, does not abridge the rights of the appellant, guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States in that said Court refused to accept the appellant's contention that said statute,

(a) Discriminates in favor of resident manufacturers against non-resident manufacturers.

(b) Denies to the appellant the equal protection of the laws of Virginia.

(c) Discriminates in favor of resident peddlers against non-resident peddlers.

Appellant further states, in conformity with the statement filed with the Clerk of the Supreme Court of Appeals of Virginia, by appellee, that it desires all of the record as certified by the Clerk of the Supreme Court of Appeals of Virginia, to be printed as the record in this case.

[fol. 67] Wherefore, petitioner prays accordingly.

Caskey Baking Company, Inc., a Corporation, by Counsel. R. Gray Williams, Winchester, Va., Clarence E. Martin, Martinsburg, W. Va., Attorneys for Appellant.

Service of the above accepted.

Abram P. Staples, Attorney General of the Commonwealth of Virginia.

Endorsed on Cover: File No. 45,025. Virginia, Supreme Court of Appeals, Term No. 676. Caskey Baking Company, Inc., Appellant, vs. Commonwealth of Virginia. Filed January 6, 1941. Term No. 676 O. T. 1940.